No. 17-6075

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2017

KEITH THARPE,

Petitioner,

-v-

ERIC SELLERS, WARDEN
Georgia Diagnostic Prison,

Respondent.

THIS IS A CAPITAL CASE

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

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Petitioner, Keith Tharpe, respectfully submits this Reply Brief in support of his Petition for a Writ of Certiorari to review the judgment of the Eleventh Circuit Court of Appeals, entered in the above case on September 21, 2017.

Respondent's ongoing efforts to prevent consideration of Mr. Tharpe's deeply troubling claim that one of his jurors voted to sentence him to death because he is a "nigger," rely on two basic premises.[1] First, he blames Mr. Tharpe for failing to prove his claim years ago under an

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[1] It must be noted that this issue is being litigated under warrant despite the fact that Mr. Tharpe promptly filed his Rule 60(b) motion in June 2017, and that it was Respondent who requested an additional three weeks to respond, ostensibly because new counsel was on the case. *See* Dkt. No. 85 at 2. That attorney, Katherine Iannuzzi, does not appear to be on the case any

erroneous standard that both the parties and the courts believed applied – a standard Mr. Tharpe could not satisfy on the evidence he was able to present and that accordingly justified his focus in earlier proceedings on other, potentially more winnable claims. Second, Respondent urges that the claim is and remains procedurally defaulted, even though the state court's procedural default analysis applied this same erroneous standard and, having ruled the evidence of Juror Gattie's racism inadmissible, failed to address any of it in finding Mr. Tharpe had not shown prejudice. Both arguments are specious. This Court must act to prevent the intolerable – the execution of an African-American man sentenced to death on the basis of his race.

I. Because Mr. Tharpe Properly Presented His Juror-Bias Claim In Both State And Federal Court, Respondent's Suggestion That He Abandoned The Claim Is Baseless.

In the district court, Respondent attempted to argue that Mr. Tharpe's racist-juror claim was unexhausted, Dkt. 89 at 7 n.2, but the district court rejected that claim as itself waived, Dkt. 95 at 4 n.3. Before the Eleventh Circuit, Respondent continued to insinuate that Mr. Tharpe neglected this claim for 20 years and therefore should not be heard to complain now. *See, e.g.*, Response in Opposition to Motion for Certificate of Appealability and Motion for Stay of Execution at 5, 9, 24, 25, 26-27. Before this Court, he claims that it is Mr. Tharpe's fault that no court has reviewed the merits of his claim because he was not sufficiently diligent in pursuing

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longer, as shown by her absence from the pleadings filed in the Eleventh Circuit and in this Court. *See* Respondent's Opposition to COA in CA 11 No. 17-14027; Respondent's Opposition to Petitioner's Motion for an Order Staying His Execution in CA 11 No. 17-14027; Brief in Opposition. Respondent, moreover, took a full week to respond to Mr. Tharpe's COA Application, despite the fact that Mr. Tharpe by that time was under warrant.

the claim. Brief in Opposition ("BIO") at 1-2. Respondent's complaints rest on his misconstruction of both the record and the Georgia's habeas corpus procedures.

Respondent's contention that Mr. Tharpe's juror-bias claim was not briefed is simply incorrect. The parties engaged in substantial briefing of the issue in litigating Mr. Tharpe's right to depose the jurors, as well as multiple days of hearings presenting evidence and argument regarding the claim. *See, e.g.* Dkt. 14-1 – 14-2; Dkt. 14-3 – 14-4; Dkt. 14-13 at 2-6; Dkt. 14-15 at 2-5; Dkt. 14-16 at 5-8, 10-14; Dkt. 15-1 – 15-2; Dkt. 15-13 – 15-14. There certainly can be no question that the state habeas court was aware of the issue and familiar with the law, as it devoted seven pages to the claim in finding the evidence to support the claim inadmissible and the claim procedurally defaulted. *See* Dkt. 19-10 at 98-104.

Georgia law did not require the issue to be further briefed in the post-hearing brief – indeed, Georgia's habeas corpus law does not require that issues be briefed at all by the parties. *See* Superior Court Rule 44.11 (providing that "[w]ithin 60 days after the evidentiary hearing, petitioner *may* file any brief and if so directed by the court *shall* file proposed findings of fact and conclusions of law and a proposed order") (emphasis added). Nor was Mr. Tharpe required to address the claim in his proposed final order. *See Williams v. State*, 274 Ga. 704, 704 (2001) (Carley, J., dissenting) (observing that the court had previously remanded the case to the state habeas court because that court had erred in finding that petitioner had "waived claims that he did not include in his proposed final order") (quoting prior unpublished order).[2] And, had the

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[2] Nor was there any requirement that the issue be fully briefed in Mr. Tharpe's application for a certificate of probable cause ("CPC") to appeal. Mr. Tharpe incorporated by reference all claims not briefed in his CPC application that had been raised in his amended petition and in the evidentiary hearings and motions in the case. *See* Dkt. 19-12, at 3 n.2. No more was required. Ga. Sup. Ct. Rule 22, providing that "[a]ny enumerated error not supported by argument or citation of authority in the brief shall be deemed abandoned" is a rule that applies

Georgia Supreme Court granted a CPC and heard the case on appeal, it would have been authorized to address the juror-bias claim, irrespective of whether Mr. Tharpe had raised it in his CPC application. *See Smith v. Francis*, 253 Ga. 782, 782 (1985) (noting that the grant of CPC "brings the entire case before this Court").[3]

In considering Mr. Tharpe's pursuit of this claim in both state and federal court, it cannot be overstressed that, prior to *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017), Mr. Tharpe's juror bias claim was essentially dead in the water in Georgia and in this Circuit. In *Spencer v. State*, 260 Ga. 640 (1990), the case on which the state habeas court had relied in ruling Mr. Tharpe's evidence inadmissible, *see* Dkt. 19-10 at 100, the Georgia Supreme Court had held that evidence showing that "two white jurors [had made] racially derogatory comments about the

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to the briefing of *appellate briefs*. Ga. Sup. Ct. Rule 22. The court's rules clearly distinguish between appellate briefs and other forms of written submissions to the court. *See, e.g.*, Ga. Sup. Ct. Rule 20 (providing that "[b]riefs, petitions for certiorari, *applications for appeal*, motions, and responses shall be limited to 30 pages . . . ."). Mr. Tharpe's CPC application, a type of pleading not expressly identified in Rule 22, is accordingly not governed by that rule. *Expressio unius exclusion alterius*.

[3] As the Eleventh Circuit has observed:

> For every application for a certificate of probable cause, the Georgia Supreme Court must satisfy itself that the petitioner's claims are either procedurally defaulted or meritless.
>
> And, in fact, the Georgia Supreme Court thoroughly reviews the evidence and the petitioner's arguments before denying an application for a certificate of probable cause. The Georgia Supreme Court makes its decision with the aid of the complete record and transcript, which the clerk of the superior court is required to transfer to the clerk of the Supreme Court. . . . . The Georgia Supreme Court clearly understands that a summary denial of a certificate of probable cause is a determination that a prisoner's claims lack merit.

Wilson v. Warden, 834 F.3d 1227, 1233 (11th Cir. 2016), *cert. granted, Wilson v. Sellers*, 137 S. Ct. 1203 (2017).

defendant during the jury's deliberations" was inadmissible. The court excluded consideration of a juror affidavit indicating that another juror had stated, "A nigger deserves to be dead," and discussing the affiant's belief that race was an important factor in certain jurors' decisions to conviction the defendant and sentence him to death. *See* Petition for Writ of Certiorari in *Spencer v. Georgia*, Sup. Ct. No. 90-7435, at 12 (attached as Exhibit A to Reply in Support of Application for Certificate of Appealability, filed in Eleventh Circuit on September 19, 2017). *See also Spencer v. Georgia*, 500 U.S. 960 (1991) (Kennedy, J., concurring in denial of certiorari). Mr. Tharpe's racist-juror claim would have fared no better in the Eleventh Circuit prior to *Pena-Rodriguez*. *See, e.g., Dobbs v. Zant*, 963 F.2d 1403, 1407-1408 (11th Cir. 1992), *rev'd on other grounds, Dobbs v. Zant*, 506 U.S. 357 (1993). *See also Dobbs v. Zant*, 720 F. Supp. 1566, 1571-79, 1579 n. 26 (N.D. Ga. 1989) (rejecting claims that death sentence was invalid as a result of jurors' racial bias, rejecting consideration of juror affidavits and noting that "[w]hen a habeas petitioner challenges the prejudice of the jury, the standard is prejudice regarding the jury as a *whole*") (emphasis original).

As Respondent's counsel explained in state habeas proceedings:

> The burden is that Petitioner must prove that the decision makers, plural, in his case, acted with discriminatory purpose. That means they must prove that racial considerations played an integral role in his sentencing.

Dkt. No. 15-6 at 18-19.

> [E]xamining the *Dobbs* precedent, and *Dobbs* was reversed but not on this issue, in the 11th Circuit this case does represent the last word on this issue in the *Dobbs* case. Even in that case, where the judge even found that some of the jurors had some racial prejudices walking in, ***it is incumbent upon Petitioner to show that they acted, they being the decision makers in his case, acted with discriminatory purpose.*** And the Court specifically rejected anyh contention that background or general racial attitudes was a proper showing which supported any kind of nexus to show that the decision makers in *Dobbs*' case acted with discriminatory purpose.

> Again, the Court held that the jurors denied that race had any effect on their decision and nothing in the record indicated that the jurors acted with purposeful discrimination.
>
> Again, we would reiterate that the focus, if permitted at all, should be solely upon the inquiry of whether the decision makers acted with discriminatory purpose.

Dkt. No. 15-8 at 6-7 (emphasis added).[4] And this is the standard the state habeas court applied in finding that Mr. Tharpe had "failed to show that any alleged racial bias of Mr. Gattie's was the basis for sentencing the Petitioner, as required by the ruling in *McCleskey*. See *McCleskey v. Kemp*, 481 U.S. 279 (1987)." Dkt. No. 19-10 at 103.

Despite the fact that the claim could not have prevailed in either state or federal court until this Court decided *Pena-Rodriguez*,[5] Mr. Tharpe has pursued his racist-juror claim in every

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[4] Counsel for Mr. Tharpe believed this was the standard as well: "In Mr. Tharpe's case, I believe he was sentenced to death in violation of the 8th and 14th Amendments because race impermissibly affected the decision makers." Dkt. No. 15-6 at 22.

[5] *Pena-Rodriguez* not only clarified that the Equal Protection Clause and the Sixth Amendment right to an impartial jury override the interests protected by the no-impeachment rule. The case also established a lower standard for proving a constitutional violation than that presumed by the courts at the time Mr. Tharpe's claim was first presented. In *Dobbs*, for instance, the Court rejected the petitioner's racial bias claim on the ground that "jurors denied that race had any effect on their decision, and nothing in the record indicates that the jurors acted with *purposeful discrimination*." *Dobbs*, 963 F.2d at 1408. *See also Dobbs*, 720 F. Supp. at 1579 and 1579 n. 26 ("Although the jurors possess some racial prejudices, and some more so than others, Dobbs has not shown that the jurors, either individually or as a whole, were influenced by prejudices that would make them favor the death penalty for a black person who murdered a white person. * * * When a habeas petitioner challenges the prejudice of the jury, the standard is prejudice regarding the trial jury as a *whole*.") (emphasis original). *Pena-Rodriguez*, however, clearly established that, to prevail, a defendant must show that "one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict" by proof that "racial animus was a significant motivating factor in the juror's vote to convict." *Pena-Rodriguez*, 137 S. Ct. at 869.

Although Mr. Tharpe was unable to meet the *Dobbs* standard in state habeas proceedings by showing the jury deliberations were thoroughly contaminated by jurors' racial bigotry, that standard no longer applies. Under *Pena-Rodriguez*, proof of Juror Gattie's racial bias and its express impact on his decision to vote for the death penalty suffices to invalidate Mr. Tharpe's death sentence.

forum in which he has appeared.[6] This Court should not be distracted from the grave error presented by Juror Gattie's virulent racism and its impact on Mr. Tharpe's death sentence by the procedural smokescreen Respondent seeks to create.

II. *Pena-Rodriguez* Clarifies That Both The State And Federal Courts Erred In Procedurally Defaulting Mr. Tharpe's Juror-Bias Claim.

Respondent insists that "*Pena-Rodriguez* does not lift the procedural default bar of Petitioner's claim." He urges that Mr. Tharpe has never explained "why he waited until seven years after his trial to raise his juror misconduct claim" and that *Pena-Rodriguez* "does not provide the extraordinary circumstances for him to do so now." BIO at 16-17.

Mr. Tharpe did not learn of Juror Gattie's racists views until state habeas counsel visited him while conducting routine post-conviction juror interviews. Dkt. No. 15-16 at 10-13, 17-26; Dkt. Nos. 77-6, 77-7, and 77-8. As the Georgia Supreme Court has recognized, trial counsel is obligated to interview jurors following the trial only "'*where there is evidence of juror misconduct* that might undermine the verdict . . . ." *Turpin v. Todd*, 268 Ga. 820, 827 (1997) (emphasis original) (quoting ABA Standards for Criminal Justice, Standard 4-7.3 (2d ed. 1980)). Here, as in *Todd*, "there was simply no evidence in this case that would have alerted trial or appellate counsel to the presence of any misconduct by the jury . . . ." *Id.* Mr. Gattie's affidavits and testimony, as well as the affidavits of Georgia Resource Center counsel, clearly establish that Mr. Gattie's racist remarks were not made to Mr. Tharpe or his counsel until well after Mr.

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[6] In *Reed v. Ross*, 468 U.S. 1 (1984), this Court "held that a claim that 'is so novel that its legal basis is not reasonably available to counsel' may constitute cause for a procedural default . . . ." *Bouseley v. United States*, 523 U.S. 614, 622 (1998) (quoting *Ross*, 468 U.S. at 16). Here, Mr. Tharpe did in fact raise his claim, again and again, despite the fact that existing precedent in state and federal court rendered his proof insufficient prior to *Pena-Rodriguez*. Surely, this was sufficient to have preserved the claim for review now.

Tharpe's state habeas petition had been filed and, upon discovery, were promptly brought to the state habeas court's attention. *See* Docs. 77-2, 77-3, 77-4, 77-5, 77-6, 77-7, 77-8. Mr. Gattie's voir dire, moreover, gave no hint that he harbored such virulent racist views, *see* Dkt. 11-3 at 85-99, and "the record reveals no other evidence that would have alerted trial or appellate counsel to the fact that jury misconduct . . . occurred at trial." This clearly constitutes "cause" to excuse the failure to raise the unknown racial-bias claim at the motion-for-new-trial or appellate stages of the case.

Respondent also defends the Eleventh Circuit's insistence that reasonable jurors could not debate the court's conclusion that Mr. Tharpe has not shown prejudice resulting from Juror Gattie's blatant racist beliefs because "[a]s correctly found by the district court, the state habeas court's prejudice analysis 'comports with the analysis required by *Pena-Rodriguez*," given "the extremely narrow holding in *Pena-Rodriguez*, and the facts of Petitioner's case . . . ." BIO at 17. This argument is baseless.

Mr. Gattie's sworn testimony that he sentenced Mr. Tharpe to death because he is a "nigger" who killed someone Mr. Gattie considered "'good' black folk," and Mr. Gattie's Bible-study-based musings about whether "black people even have souls" – testimony that Mr. Gattie *never* repudiated – clearly satisfies the test set forth in *Pena-Rodriguez* that to qualify as proof that a verdict was impermissibly tainted by a juror's reliance on "racial stereotypes or animus" a juror's "statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict [or sentence]." *Pena-Rodriguez*, 137 S. Ct. at 869. None of this evidence, which the state habeas court had ruled *inadmissible*, was given any consideration by the state habeas court in its analysis of prejudice. First, contrary to Respondent's contention that the state habeas court's default analysis "assumed the evidence was admissible," BIO at 15, the state

habeas court actually said only that it would find the claim defaulted "*even if* Petitioner had admissible evidence to support his claims of juror misconduct," Dkt. No. 19-10 at 102 (emphasis added). Moreover, the court did not address any of the evidence indicative of Juror Gattie's bigotry, stating only that Gattie had testified "that he 'did not vote to impose the death penalty because [the Petitioner was a black man' and that 'at no time was there any discussion about imposing the death sentence because [Petitioner] was a black man.'" Dtk. No. 19-10 at 102-03. Finally, even had the state habeas court considered the evidence of Mr. Gattie's racist beliefs, it analyzed prejudice under a standard this Court's *Pena-Rodriguez* decision has shown to be incorrect. *See* Dkt. No. 19-10 at 102 ("[T]his Court concludes that Petitioner has failed to show that any alleged racial bias of Mr. Gattie's was *the basis for sentencing the Petitioner*, as required by the ruling in *McCleskey*.").

Respondent's efforts to distinguish this case from *Pena-Rodriguez* by suggesting that any court could reasonably construe Barney Gattie's racist language and noxious beliefs, moreover, is thoroughly jaundiced and should cause this Court concern about the potential impact of allowing Mr. Tharpe to be executed despite this disturbing evidence. According to Respondent, "the determination of whether the evidence shows improper racial animus is left to the 'discretion of the trial court' who must evaluate all the circumstances surrounding the evidence." BIO at 18. Respondent urges that "[a]s correctly found by the district court, "The "circumstances" presented in Tharpe's case are dissimilar from those in *Pena-Rodriguez*." BIO at 18 (quoting ECF No. 95 at 20-21). For the reasons already set forth in the Petition for Writ of Certiorari, addressing the unambiguous racism expressed in the word "nigger" and the clear

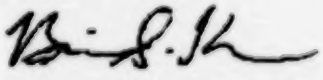
racist import of Mr. Gattie's first affidavit[7] – which he *never* repudiated – it is imperative that this Court reject Respondent's cynical efforts to downplay the evidence as proof of no more than an "offhand comment indicating racial bias or hostility." *Pena-Rodriguez*, 137 S. Ct. at 869. No reasonable construction of Barney Gattie's language can dispel the stench of racism wafting from his words.

CONCLUSION

This Court's commitment to the eradication of racial discrimination in the justice system is being tested in this case. For the reasons set forth in above and in Mr. Tharpe's petition for writ of certiorari, he respectfully asks this Court to grant the petition and prevent the miscarriage of justice that will occur if the State is permitted to execute him despite compelling proof that his death sentence was motivated by Juror Gattie's racist views.

This 26th day of September, 2017.

Respectfully submitted,



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[7] *See* Petition for Writ of Certiorari at 22-25.

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CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing document this day by electronic mail on counsel for Respondent as follows:

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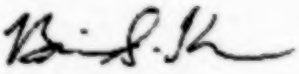
This 26th day of September, 2017.



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